Law Review 12109

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USERRA Forbids Discrimination with respect to Retention in Employment

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1.1.1.7—USERRA applies to state and local governments
1.2—USERRA forbids discrimination
1.4—USERRA enforcement

***Lowe v. Metropolitan Government of Nashville & Davidson County,* 2012 U.S. Dist. LEXIS 38953 (M.D. Tenn. Mar. 22, 2012).**

Like the case discussed in Law Review 12108[1], the immediately preceding article in this series, this case involves a reservist whose employment contract with a local school district was not renewed. As in the preceding article and case, the reservist alleged that the school district's decision not to renew the contract was motivated by annoyance with the plaintiff because of his reserve activities and absences from work necessitated by those activities.

There is one big difference in how these cases were brought. In the case discussed in Law Review 12108, the United States Department of Justice (DOJ) filed suit on behalf of SFC Dwayne Coffer, USAR in the United States District Court for the Eastern District of North Carolina. Coffer's contract was not renewed at the end of the 2007-08 school year, and Coffer promptly complained to the United States Department of Labor (DOL), alleging that the non-renewal of the contract violated the Uniformed Services Employment and Reemployment Rights Act (USERRA). DOL investigated Coffer's complaint and found it to have merit. After the school district refused to come into compliance, DOL referred the case file to DOJ, recommending that DOJ file suit on behalf of Coffer. DOJ did so, but not until October 2012, 52 months after Coffer's employment contract expired and was not renewed.

The *Lowe* case involves Major Rufus Lowe, USAR.[2] Lowe did not depend upon DOL and DOJ. Instead, he retained an attorney[3] and filed suit against the school district in the United States District Court for the Middle District of Tennessee, as permitted by section 4323 of USERRA, 38 U.S.C. 4323. As a result, the *Lowe* case has moved along much more expeditiously.

As I explained in Law Review 89 (September 2003) and other articles, it is not possible for an individual USERRA plaintiff to sue a state government employer in federal court, because of the 11th Amendment to the United States Constitution. USERRA lawsuits against states need to be brought by DOJ, in the name of the United States, as plaintiff.

The 11th Amendment is not a problem in this case because the defendant employer is a political subdivision of the State of Tennessee, not the state itself.[4] The United States Supreme Court has held that political subdivisions do not have 11th Amendment immunity. *See Hopkins v. Clemson College,* 221 U.S. 636, 645 (1911).

The final subsection of section 4323 provides: "*In this section,* the term 'private employer' includes a political subdivision of a State." 38 U.S.C. 4323(i) (emphasis supplied). Thus, this case could be brought and was brought by private counsel in Lowe's own name.

Lowe's contract with the Metropolitan Nashville Public Schools (MNPS) was not renewed at the end of the 2009-10 school year.[5] Lowe retained an attorney and sued MNPS in the United States District Court for the Middle District of Tennessee. The case was assigned to Judge Kevin H. Sharp.

In accordance with the Federal Rules of Civil Procedure (FRCP), the parties engaged in a period of discovery. Each party in a civil case is entitled to demand and to receive pertinent information from the opposing party. The discovery process includes interrogatories, document production demands, depositions, requests for admissions, etc.

At the end of the discovery process, MNPS filed a motion for summary judgment, in accordance with Rule 56 of the FRCP. The defendant school district argued that based on the evidence turned up during the discovery process there was *no remaining material issue of fact* and that the defendant (the party moving for summary judgment) was entitled to judgment as a matter of law. Judge Sharp denied that motion on March 22, 2012 and wrote this opinion by way of explanation as to why he had denied the defendant's motion for summary judgment.

Section 4311 of USERRA provides:

"(a)A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, *retention in employment*, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b)An employer may not discriminate in employment against or take any adverse employment action against any person because such person

(1) has taken an action to enforce a protection afforded any person under this chapter,
(2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter,
(3) has assisted or otherwise participated in an investigation under this chapter, or
(4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
(c)An employer shall be considered to have engaged in actions prohibited—
(1)under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
(2)under subsection (b), if the person's

(A) action to enforce a protection afforded any person under this chapter,

(B) testimony or making of a statement in or in connection with any proceeding under this chapter,

(C) assistance or other participation in an investigation under this chapter, or

(D) exercise of a right provided for in this chapter, is *a motivating factor in the employer's action*, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d)The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title."

38 U.S.C. 4311 (emphasis supplied).

Under section 4311(c), Lowe is not required to establish that the non-renewal of his contract was motivated *solely* by his Army Reserve activities and obligations. Lowe is only required to prove that his Army Reserve activities and obligations were *a motivating factor* in the employer's decision. If Lowe proves that, the burden of proof shifts to the employer, to prove that it *would have fired Lowe anyway,* even if he had not been a member of the Army Reserve.

Lowe apparently does not have a "smoking gun" to establish that the non-renewal of his contract was motivated by his Army Reserve service, but he does have some evidence tending to show that MNPS decision-makers had Lowe's Army obligations in mind when they decided not to renew his contract.

Judge Sharp's decision includes the following paragraph:

"In the absence of direct evidence [of anti-military animus and discrimination], a plaintiff can establish a USERRA claim based upon circumstantial evidence. That is, discriminatory motivation can be inferred from a variety of considerations, including: (1) proximity in time between the employee's military activity and the adverse employment action, (2) inconsistencies between the [employer's] proffered reason [for the adverse action] and other actions of the employer, (3) an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses." (Internal citations omitted.)

The next step is for this case to go to trial, potentially before a jury.[6] Judge Sharp held that it would not be proper to grant the defendant's motion for summary judgment because there are material issues of fact—the plaintiff developed sufficient evidence during the discovery process to preclude summary judgment for the defendant. There is sufficient evidence to support a jury verdict for the plaintiff, according to Judge Sharp. It is also possible that the parties will reach a settlement, and that settlement may or may not have a confidentiality clause. We will keep the readers informed of developments in this case, unless a confidentiality clause precludes us from obtaining this information from the plaintiff and his counsel.

Note: *After the judge denied the defendant's motion for summary judgment, the judge conducted a settlement conference and pushed the parties to settle, which they did. The terms of the settlement are confidential. This case is now over.*

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 809 articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.

[2] Major Lowe is certainly eligible for ROA membership, but he is not a member. We are working on that.

[3] Lowe is represented by attorney Allen Woods of Nashville, Tennessee.

[4] I invite the reader's attention to Law Review 1029 (April 2010). In that article, I criticize *Rimando v. Alum Rock Union Elementary School District,* 356 Fed.Appx. 989 (9th Cir. 2009) . The 9th Circuit is the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. In *Rimando,* the 9th Circuit held that the 11th Amendment precludes a suit in federal court, under USERRA, against a California public school district. The 9th Circuit did not direct that *Rimando* be published officially in Federal Reporter, Third Series, so perhaps the case is of little precedential value.

[5] This was two years after Coffer's contract was not renewed.

[6] In cases under USERRA, unlike the reemployment statute in effect before the 1994 enactment of USERRA, the plaintiff has the right to a trial by jury. I invite the reader's attention to Law Review 0737 (July 2007), Law Review 0858 (November 2008), and Law Review 0902 (January 2009).